

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division**

CSX TRANSPORTATION, INC.,  
individually and on behalf of NORFOLK  
& PORTSMOUTH BELT LINE  
RAILROAD COMPANY,

Plaintiff,

v.

Civil Action No. 2:18-cv-530-MSD-LRL

NORFOLK SOUTHERN RAILWAY  
COMPANY, *et al.*,

Defendants.

\_\_\_\_\_ /

**CSX TRANSPORTATION, INC.'S RESPONSE TO DEFENDANT MOSS'S  
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

NOW COMES Plaintiff CSX Transportation, Inc. ("CSXT"), by counsel, and responds to the motion made by Defendant Cannon Moss, pursuant to Fed. R. Civ. P. 12(h)(3) and 12(b)(1), to dismiss the claim against him for lack of subject matter jurisdiction. ECF 144. Mr. Moss is named in the Complaint in his capacity as the President and General Manager of Norfolk & Portsmouth Belt Line Railroad Company ("NPBL"). Compl. ¶ 10. In this role, Mr. Moss is a voting member of the NPBL Board of Directors. *Id.* CSXT seeks solely injunctive against Mr. Moss for allegedly breaching his fiduciary duties to the NPBL. *Id.* at ¶ 112, Prayer for Relief.

The Complaint also named the other individual directors who then sat on the NPBL's Board: Jerry Hall, Thomas Hurlbut, and Philip Merilli. Together, Moss and these three individuals constituted a majority of the voting members of the NPBL Board of Directors. *Id.* at ¶¶ 26, 27. On February 6, 2020, Defendants Hall, Hurlbut, and Merilli moved the Court to dismiss the claim against them for lack of subject matter jurisdiction, noting that they had each resigned from the

Board since CSXT filed the Complaint in October 2018. ECF 119. Thereafter, Defendant Norfolk Southern Railway Company (“NS”), NPBL, and CSX stipulated and agreed to voluntarily dismiss Defendants Hall, Hurlbut, and Merilli from this action, without prejudice, and that any final award of injunctive relief would be implemented by the then-acting NPBL Board of Directors. ECF 141. On February 26, 2020, the Court entered an order dismissing Defendants Hall, Hurlbut, and Merilli, and directing that any final award of injunctive relief entered by the Court against Defendant NPBL “will be followed and undertaken by NPBL, including through the present NPBL Board of Directors.” ECF 143.

Given this Court’s order, Defendant Moss argues that the sole claim against him is moot, that the Court lacks subject matter jurisdiction, and that he should be dismissed under Fed. R. Civ. P. 12(b)(1). Importantly, Mr. Moss is differently situated than the individual defendants who were voluntarily dismissed without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii). Unlike those individual defendants, who had resigned from the NPBL Board and thus lacked the ability to effectuate any injunctive relief granted by the Court, Mr. Moss *remains* on the NPBL Board as a voting member. He is, thus, still subject to the injunctive relief sought by CSXT and this Court has subject matter jurisdiction over the claim against him.

NS and NPBL have agreed, per the parties’ prior stipulation, to effectuate any injunctive relief granted by the Court through the present NPBL Board of Directors, and the Court has ordered the same. ECF 141, 143. If Mr. Moss will agree that he will be bound by that same stipulation, CSXT is willing to seek his voluntary dismissal, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), consistent with the process followed for the other individual directors.

Dated: March 13, 2020

Respectfully submitted,

**CSX TRANSPORTATION, INC.**

*By Counsel*

/s/ Robert W. McFarland

Robert W. McFarland (VSB No. 24021)  
Benjamin L. Hatch (VSB No. 70116)  
Jeanne E. Noonan (VSB No. 87863)  
V. Kathleen Dougherty (VSB No. 77294)  
McGUIREWOODS LLP  
World Trade Center  
101 West Main Street, Suite 9000  
Norfolk, Virginia 23510-1655  
Telephone: (757) 640-3716  
Facsimile: (757) 640-3930  
E-mail: [rmcfarland@mcguirewoods.com](mailto:rmcfarland@mcguirewoods.com)  
E-mail: [bhatch@mcguirewoods.com](mailto:bhatch@mcguirewoods.com)  
E-mail: [jnoonan@mcguirewoods.com](mailto:jnoonan@mcguirewoods.com)  
E-mail: [vk dougherty@mcguirewoods.com](mailto:vk dougherty@mcguirewoods.com)

J. Brent Justus (VSB No. 45525)  
Ashley P. Peterson (VSB No. 87904)  
McGUIREWOODS LLP  
Gateway Plaza  
800 East Canal Street  
Richmond, Virginia 23219-3916  
Telephone: (804) 775-1000  
Facsimile: (804) 775-1061  
E-mail: [bjustus@mcguirewoods.com](mailto:bjustus@mcguirewoods.com)  
E-mail: [apeterson@mcguirewoods.com](mailto:apeterson@mcguirewoods.com)

**CERTIFICATE OF SERVICE**

I certify that on this 13th day of March, 2020, a true and correct copy of the foregoing was served on all counsel of record via Notice of Electronic Filing by filing with the Court's CM/ECF system.

/s/ Robert W. McFarland

Robert W. McFarland (VSB No. 24021)  
Benjamin L. Hatch (VSB No. 70116)  
Jeanne E. Noonan (VSB No. 87863)  
V. Kathleen Dougherty (VSB 77294)  
McGUIREWOODS LLP  
World Trade Center  
101 West Main Street, Suite 9000  
Norfolk, Virginia 23510-1655  
Telephone: (757) 640-3716  
Facsimile: (757) 640-3930  
E-mail: [rmcfarland@mcguirewoods.com](mailto:rmcfarland@mcguirewoods.com)  
E-mail: [bhatch@mcguirewoods.com](mailto:bhatch@mcguirewoods.com)  
E-mail: [jnoonan@mcguirewoods.com](mailto:jnoonan@mcguirewoods.com)  
E-mail: [vkdougherty@mcguirewoods.com](mailto:vkdougherty@mcguirewoods.com)

J. Brent Justus (VSB No. 45525)  
Ashley P. Peterson (VSB No. 87904)  
McGUIREWOODS LLP  
Gateway Plaza  
800 East Canal Street  
Richmond, Virginia 23219-3916  
Telephone: (804) 775-1000  
Facsimile: (804) 775-1061  
E-mail: [bjustus@mcguirewoods.com](mailto:bjustus@mcguirewoods.com)  
E-mail: [apeterson@mcguirewoods.com](mailto:apeterson@mcguirewoods.com)

*Counsel for CSX Transportation, Inc.*